No. 88-334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN S. LYTLE

Petitioner,

v.

HOUSEHOLD MANUFACTURING, INC.,
D/B/A SCHWITZER TURBOCHARGERS,

Respondent.

REPLY BRIEF FOR PETITIONER

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I. The Seventh Amendment Compels Reversal of the Court of Appeals' Judgment

Respondent raises two analytically independent reasons why the denial of a jury trial in this case does not compel reversal of the dismissal of petitioner's claims. First, respondent claims that no denial of petitioner's Seventh Amendment rights ever occurred. Second, respondent argues that this Court should sanction the total disregard of the Seventh Amendment by lower courts.[1] Neither argument is supported by either this

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[1] This latter argument has two parts. The first concerns the application of collateral estoppel to deny a jury trial. As we explained in our opening brief, the Fourth Circuit's approach -- to ignore Seventh Amendment violations as insignificant procedural mishaps, and ask only whether the trial judge's findings were clearly erroneous -- would effectively write the Seventh Amendment out of the Constitution. Brief for Petitioner (Pet. Br. 47-50).

The second, that the denial of a jury in this case was harmless error, also fails. This Court's traditional practice when confronted with Seventh Amendment violations is a rejection of that approach. See Pet. Br. 35-38, discussing, e.g., Granfinanciera S.A. v. Nordberg, 109 S.Ct. 2782 (1989); Tull v. United States, 481 U.S. 412 (1987); Mecker Oil v. Ambassador Oil Corp., 375 U.S. 160 (1963). Moreover, that approach ignores the fundamental nature of the right to a jury trial. "The constitutional right to a jury trial embodies 'a profound judgment about the way in which the law should be

(continued...)

Court's prior decisions or by logic.

Respondent concedes, as it must, that the Court of Appeals found that petitioner's Seventh Amendment rights had been denied. But it seeks to support the Court of Appeals' judgment by arguing that the result -- affirmance of the district court -- was right even though

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[1](...continued)
enforced and justice administered.'" Carella v. California, 105 L.Ed. 2d 218, 223 (1989) (Scalia, J. concurring in the judgment) (quoting Duncan v. Louisiana, 391 U.S. 145, 155 (1968)). "It is a structural guarantee that 'reflect[s] a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.'" Id. (emphasis added). It is only after that constitutionally mandated structure is in place that a court may even begin to conduct a harmless-error analysis.

In any event, application of the appropriate harmless-error standard (i.e., Chapman v. California, 386 U.S. 18, 24 (1967) and United States v. Lane, 474 U.S. 438, 446 n. 8 (1986)), to the instant case would require reversal, if this Court concludes that a properly impaneled and instructed jury could have found for Lytle. Galloway v. United States, 319 U.S. 372, 396 (1943). Given the evidence in this case, it is clear beyond any doubt that a jury that believed petitioner's testimony could have found for him on both his discharge and retaliation claims. Since there is a reasonable possibility that the outcome would have been different had the error not occurred -- the standard used in constitutional harmless error cases -- reversal is required. See, e.g., Strickland v. Washington, 466 U.S. 668, 694 (1984).

the entire analysis used to support that result was wrong. Respondent's argument, however, substantially distorts the case law and Federal Rules of Civil Procedure on which it relies.

Put simply, respondent claims that since the evidence in this case would have compelled a directed verdict, the district court should have taken the case from the jury at some point, there was no error in never empaneling a jury to begin with. That argument bespeaks both a critical misunderstanding of the relationship between Rule 41 dismissals in bench trials and Rule 50 directed verdicts in jury trials and a critical mischaracterization of the evidence at issue in this case.

The district court dismissed petitioner's discriminatory discharge claim at the close of his case, pursuant to Fed. R. Civ. P. 41(b). Contrary to respondent's suggestion, that dismissal was not equivalent

to the ruling the district court would have been called upon to make had it been faced with a motion for a directed verdict in a jury case. Rule 41(b) applies by its own terms only "in an action tried before the court without a jury." It directs the judge to determine whether "upon the facts and the law the plaintiff has shown no right to relief" (emphasis added). It explicitly provides that "the court as trier of the facts may determine them." Id. If the court enters a Rule 41(b) dismissal against the plaintiff, it "shall make findings as provided in Rule 52(a)." Id.[2]

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2 As recently explained by the Court of Appeals for the Eighth Circuit: "In ruling on a motion for directed verdict, the judge must determine if the evidence is such that reasonable minds could differ on the resolution of the questions presented in the trial, viewing the evidence in the light most favorable to the plaintiff. On a motion for directed verdict, the court may not decide the facts itself. In deciding a Rule 41(b) motion, however, the trial court in rendering judgment against the plaintiff is free to assess the credibility of witnesses and the evidence and to determine that the plaintiff has not made out a case." Continental Casualty Co. v. DHL Services, 752 F.2d 353, 355-56 (8th Cir. 1985). Accord Stearns v. Beckman Instruments, Inc., 737 F.2d 1565, 1567 (Fed.Cir. 1984) (judgment under Rule 41(b) "need not be entered in accordance with (continued...)

In a case tried before a jury, of course, these functions are the exclusive province of the jury, not the judge. Thus, there are a number of fundamental distinctions between dismissals pursuant to Rule 41(b) and granting of directed verdicts pursuant to Rule 50(a).

First, in deciding a motion for a directed verdict, the court may neither make credibility judgments adverse to the nonmoving party nor weigh the evidence.[3] Second, in deciding whether to grant a directed verdict, the court must view all the evidence and make all the factual inferences in the light most favorable to the nonmoving

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[2](...continued)
a directed verdict standard"); Wilson v. United States, 645 F.2d 728, 730 (9th Cir. 1981) ("The Rule 41(b) dismissal must be distinguished from a directed verdict under Rule 50(a)"). See generally 5 Moore's Federal Practice ¶ 41.13[4] at 41-175 to 41-179 (2d ed. 1988).

3 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"). Gairola v. Commonwealth of Virginia Dept. of General Services, 753 F.2d 1281, 1285 (4th Cir. 1985); 9 Wright & Miller, Federal Practice and Procedure: Civil § 2524 at 541-42; § 2536 at 593-95 (1971).

party.[4] Finally, a court may not weigh conflicting evidence.[5]

By contrast, in deciding a Rule 41(b) motion, the judge is not required to afford these burden-shifting and burden-heightening rules. Thus, when a judge decides a Rule 41(b) motion, he decides which side he believes, and not whether all reasonable people would be compelled to favor that side. In short, the standard in a Rule 41(b) case more nearly resembles the standard used in de novo review (i.e., "which side should win?") rather than the standard used in directed verdict determinations (i.e., "could any jury find for the other side?").

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[4] Anderson v. Liberty Lobby, Inc., 477 U.S. at 255; see also, cased cited Pet. Br. 31 n. 18.

[5] Where there is any "uncertainty" as to the issue before the jury which "arises from a conflict in testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." Gunning v. Cooley, 281 U.S. 90, 94 (1930).

The district court's approach in this case provides a paradigmatic illustration of this general principle. Three examples will suffice. First, the district court's finding that plaintiff had 9.8 hours of excessive unexcused absence was crucial to its dismissal of the discharge claim. That finding necessarily rejected petitioner's testimony that his absences were due to his doctor's appointment and his physical inability to work, and that respondent's policy treated absences due to these kinds of reasons as excused absences granted as a matter of course. It might well be that a jury could disbelieve Lytle. But on a directed verdict motion, the judge could not have made that determination. Indeed, he would have been required to assume that the jury would find for Lytle if any reasonable jury could do so. And so the judge's Rule 41(b) finding reflects an issue that would have had to go to the jury in a jury case.

Second, the court declined to find that white employees charged with lateness or absence were treated more leniently that Lytle had been. Again, while a jury might have been entitled to reject Lytle's claim, that rejection would have depended on an assessment of Lytle's credibility as well as that of any of respondent's supervisory personnel who might have testified that Lytle's situation was distinguishable. That rejection would not have been within the judge's province in a jury trial case.

Finally, the district court expressly recognized that it was making findings of fact about issues on which reasonable individuals could differ. Lytle's trial counsel suggested that "the only reason Mr. Lytle is being charged with unexcused absence . . . is because of Mr. Larry Miller's decision not to consider Friday a vacation day and to make Saturday a mandatory 8-hour overtime work

period. And the misunderstanding that Mr. Lytle had about that is the only reason he didn't call in." Tr. 252-53. In response to an objection that the argument was "not necessarily supported by the evidence here" the Court stated: "It's a reasonable interpretation of the evidence." Tr. 253. Ultimately, however, the district judge rejected this "reasonable interpretation," presumably in favor of one he found more "reasonable." But, importantly, the court's statement acknowledges that a jury could have found for Lytle.[6] In light of this acknowledgement, it is simply wrong to contend that the

[6] Similarly, with regard to Lytle's claim of retaliation, a jury might well have concluded that the letter of reference given a white employee discharged during the same year was not inadvertent as the district judge found, but that no such reference was given to Lytle because he had taken action to redress an alleged violation of his federally granted rights.

Rule 41(b) dismissal was equivalent to a directed verdict, and thus that no Seventh Amendment violation occurred.[7]

II. Patterson v. McLean Credit Union Does Not Preclude Petitioner From Maintaining This Action

Respondent urges as an alternative ground for affirmance that petitioner's section 1981 claims are precluded by this Court's recent decision in Patterson v. McLean Credit Union, 105 L. Ed. 2d 132 (1989). Brief for Respondent (R. Br.) 1-18. We agree that, if this case is remanded for a jury trial, respondent could seek to invoke Patterson in any subsequent litigation regarding the scope of section 1981. There is no denying that

[7] Respondent's reliance on the Miller and Lane affidavits regarding petitioner's discharge claim (presumably as a proxy for the testimony they would have offered had they actually testified at trial -- which they did not) necessarily means that they are not claiming that a directed verdict would have been appropriate at the end of petitioner's case in chief -- since the evidence on which respondents rely would not have been in the record at that time -- but rather at the end of respondent's case.

Patterson raises a wide variety of complex and novel issues about the interpretation of section 1981. But we believe that this Court should not undertake to address those issues in the context of the instant case.

Respondent asks this Court to hold that section 1981 does not apply to racially motivated discharges.[8] But as respondent implicitly concedes (R. Br. 12), respondent did not raise that issue in the district court or the court of appeals.[9] The respondent in Patterson itself

[8] Respondent construes Patterson as overruling the dozens of circuit decisions holding section 1981 applicable to discharge claims. See, e.g., Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987); Lopez v. S.B. Thomas, Inc., 831 F.2d 1184 (2d Cir. 1987); Jackson v. University of Pittsburgh, 826 F.2d 230 (3d Cir. 1988); Brady v. Allstate Insurance Co., 683 F.2d 86 (4th Cir.), cert. denied, 459 U.S. 1038 (1982); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir.) cert. denied, 401 U.S. 948 (1971); Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985); Johnson v. Yellow Freight System, Inc., 734 F.2d 1304 (8th Cir.), cert. denied, 469 U.S. 1041 (1984); Fong v. American Airlines, Inc., 626 F.2d 759 (9th Cir. 1980); Conner v. Fort Gordon Bus Co., 761 F.2d 1495 (11th Cir. 1985).

[9] Respondent agreed in the Fourth Circuit that section 1981 generally "prohibits employment discrimination on the basis of race." (Brief for Appellee, No. 86-1097, 4th Cir., p. 38). Respondent did not argue that petitioner could not have maintained an action, based

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had failed to raise below any argument that section 1981 precluded Patterson's section 1981 promotion claim; for that reason the Court declined to resolve the sufficiency of that particular claim. 105 L. Ed. 2d at 156. Here, as in Patterson, the Court should adhere to its general practice of not addressing in the first instance issues not raised or resolved below. Tacon v. Arizona, 410 U.S. 351, 352-53 (1973); Ramsey v. United Mine Workers, 401 U.S. 302, 312 (1971). Respondent argued in the court of appeals that section 1981 does not prohibit the particular form of retaliation alleged by petitioner, but that argument was based on a theory quite unrelated to the

[9](...continued)
solely on section 1981, for a racially motivated discharge. Rather, respondent's sole contention in the lower courts was that petitioner forfeited his right to enforce the section 1981 prohibition against discriminatory discharge when petitioner "combine[d]" that section 1981 claim with a Title VII claim in the same complaint. (Id. at 37). Respondent denied that "Title VII and § 1981 claims may be brought together on the same facts," (id. at 40), an argument that would have been equally applicable to a section 1981 hiring claim. In this Court respondent has abandoned this contention.

holding in Patterson.[10] The court of appeals, moreover, did not resolve any question regarding the applicability of section 1981 to acts of retaliation.[11] Here too it would be prudent to permit the sufficiency of the retaliation claim to be addressed in the first instance by the lower courts on remand. "Questions not raised below are those on which the record is very likely to be inadequate, since

[10] Respondent urged below that the complaint failed to allege with sufficient specificity that the retaliatory act was racially motivated. (Brief for Appellee, No. 86-1097, 4th Cir., pp. 37-40).

[11] Prior to Patterson, there was a consensus among the circuits that section 1981 was indeed applicable to retaliation. See, e.g., Choudhury v. Polytechnic Institute of New York, 735 F.2d 38 (2d Cir. 1984); DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 312 (2d Cir. 1975), modified on other grounds, 520 F.2d 409 (2d Cir. 1975); Goff v. Continental Oil Co., 678 F.2d 593. 598 (5th Cir. 1982); Pinkard v. Pullman-Standard, 678 F.2d 1211, 1229, n.15 (5th Cir. 1982) (per curiam), cert. denied, 459 U.S. 1105 (1983); Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980); Harris v. Richards Mfg. Co., 675 F.2d 811, 312 (6th Cir. 1982); Winston v. Lear-Siegler Inc., 558 F.2d 1266, 1268-70 (6th Cir. 1977); Greenwood v. Ross, 778 F.2d 448, 455 (8th Cir. 1985); Sisco v. J.S. Alberici Const. Co., 655 F.2d 146, 150 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982); Setser v. Novack Investment Co., 638 F.2d 1137, 1146 (8th Cir.), modified, 657 F.2d 932, cert. denied, 102 S.Ct. 615 (1981); London v. Coopers & Lybrand, 644 F.2d 811 (9th Cir. 1981); Long v. Laramie County Community College Dist., 840 F.2d 743 (10th Cir. 1988).

it certainly was not compiled with those questions in mind." Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

Respondent suggests that its prior failures to object to the section 1981 claims should be excused because the recent decision in Patterson was an "intervening change in controlling law." R. Br. 12. But the complaint whose sufficiency respondent now seeks to challenge also predates Patterson. Neither the complaint nor the answer in this case were or could have been framed with Patterson "in mind."[12] In the wake of Patterson the lower courts have generally permitted section 1981 plaintiffs to amend their complaints and pursue necessary additional discovery,[13] sensitive to Judge

[12] The section 1981 claims themselves were never tried, having been dismissed on a ground which the court of appeals held, and which respondent does not deny, was erroneous. Pet. App. 7a n. 2.

[13] English v. General Development Corp., 50 FEP Cas. 825 (N.D.Ill. 1989); Hannah v. The Philadelphia Coca-Cola Bottling Co, 1989 U.S.Dist. LEXIS 7200 (E.D.Pa. 1989); Prather v. Dayton Power & Light Co., 1989 U.S. Dist. LEXIS 10756 (S.D.Ohio 1989).

Posner's admonition that judges should recognize that such plaintiffs often face unusual difficulties when they are compelled to "negotiate the treacherous and shifting shoals of present-day federal employment discrimination law." Malhotra v. Cotter & Co., 50 FEP Cases 1474, 1480 (7th Cir. 1989). The resolution of any issues raised by Patterson regarding the claims in this case should await whatever clarification such amendment or discovery might bring. Here, as in other cases,[14] this Court should direct that the sufficiency of section 1981 claims after Patterson be assessed in the first instance by the lower courts.

Resolution of the Patterson issues in this Court is not required by the usual practice of deciding cases on statutory rather than constitutional grounds. As the

[14] Bhandari v. First National Bank of Commerce, 106 L. Ed. 2d 558 (1989); Pullman Standard v. Swint, 58 U.S.L.W. 3288 (1989); Swint v. Pullman Standard, 58 U.S.L.W. 3288 (1989).

briefs of the parties make clear, the merits of the question presented by the petition raise both a non-constitutional and a constitutional issue. We argue, first, that ordinary principles of collateral estoppel simply do not apply in this case, that reversal for a jury trial would be required even if the right to jury trial at issue were statutory rather than constitutional. (See P. Br. 41-45). The determination whether collateral estoppel would be inapplicable to a statutory right to trial by jury, of course, would not be a constitutional question. We argue, second, that if collateral estoppel would ordinarily apply in the procedural posture of this case, its application in this particular case would be inconsistent with the Seventh Amendment.[15] Although this second contention

[15] This may well be one of the admittedly uncommon cases in which it would be appropriate to address the constitutional issue. The ordinary rule in favor of avoiding constitutional questions concerns in particular cases presenting "novel" constitutional issues, Leroy v. Great Western United Corp., 443 U.S. 173, 181 (1979), or those involving constitutional challenges to statutes. Ashwander v. (continued...)

is of constitutional dimension, it is an issue the Court need not reach in order to resolve the jury trial question in our favor.

(1) Discriminatory Discharge. Respondent urges this Court to hold that all discriminatory discharges are not actionable under section 1981. If the application of section 1981 to claims of this sort necessarily gave rise to a simple rule, either including or excluding all cases that might be characterized as "discharges," this might be an issue that could appropriately be resolved at this juncture. But because of the widely differing events that may occur when an employee loses his or her job, the

[15](...continued)
Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936)(Brandeis, J., dissenting). In the instant case the constitutional issue has already been resolved, and repeatedly so, in petitioner's favor (P. Br. 34-41), and involves not a potential conflict with a co-equal branch of government, but this Court's special responsibility to supervise compliance with the Seventh Amendment by the lower federal courts. On the other hand, the complex statutory questions raised by respondent regarding the meaning of Patterson are entirely novel, having their origins in a decision less than six months old.

application of Patterson and section 1981 to discharges, like their application to promotions, is complex and fact-specific.

The mere announcement that an employee is fired may by itself do no more than terminate a contractual relationship; if that were all that occurred when a particular employee was dismissed, such an event might arguably constitute pure post-formation conduct.[16] But what actually occurs in a discharge case may in fact be more complex. Having been formally dismissed, the

[16] Several post-Patterson cases hold that all racially motivated discharges are actionable under section 1981. See, e.g., Birdwhistle v. Kansas Power and Light Co., 51 FEP Cases 138 (D. Kan. 1989); Booth v. Terminix International, 1989 U.S.Dist. LEXIS 10618 (D. Kan. 1989). At least where the discharged worker was an "at will" employee, this conclusion seems consistent with Patterson, since at-will employment is commonly regarded as "hiring at will". Corbin on Contracts, § 70 (1952); Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416,417 (1895). An employer who fires an at-will employee is not terminating an existing contract, but refusing to make new additional unilateral contracts. Since, however, at least some discharges of at-will or other employees are undeniably still actionable after Patterson, and the instant complaint thus cannot be dismissed at this juncture, it is not necessary to decide whether all discharges are still actionable.

potential plaintiff, technically already an ex-employee, at times seeks to get back his or her job, or, perhaps, some other position at the firm.[17] That a dismissed employee might immediately seek that old job, or some other position, is hardly surprising; "the victims of discrimination want jobs, not lawsuits." Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982).[18] Since the announcement of the dismissal, as respondent itself argues, ends the old contractual relationship, an ex-employee's renewed efforts to work at the firm constitute an attempt to make a new contract. If an employer spurns these overtures of a newly dismissed employee because he or she is black, that discriminatory act would

[17] See, e.g., Jones v. Pepsi-Cola General Bottlers, 1989 U.S.Dist. LEXIS 10307 (W.D.Mo. 1989)(discharge claim actionable under section 1981 because the employee, after being told he was fired, "requested a different job, offering to sweep floors if necessary, to stay employed. Defendant refused.").

[18] Indeed, petitioner sought reinstatement herein. Joint Appendix (JA) 13, par 3.

quite literally be a "refusal to enter into a contract" within the very terms of Patterson.[19] That would obviously be so in the case of a dismissed worker who applied a year later for employment, as occurred in McDonnell Douglas v. Green, 411 U.S. 792 (1978). There is no principled basis for treating differently a dismissed employee who seeks reinstatement, or a new position, a day, an hour, or a minute after his or her dismissal. On four occasions prior to Patterson this Court held actionable under section 1981 the discharge of a former employee; in each case the employee, after

[19] Padilla v. United Air Lines, 716 F. Supp. 485, 490 n. 4 (D. Colo. 1989)("Defendant's refusal to reconsider plaintiff for rehire due to discriminatory practices is clearly prohibited by § 1981"); Jones v. Pepsi-Cola General Bottlers, 1989 U.S.Dist. LEXIS 10307 (W.D.Mo. 1989)("in refusing on the basis of race to make a new contract [with the dismissed worker], defendant violated section 1981").

having been told of the dismissal decision, had taken steps to induce the employer to restore him to his job.[20]

Section 1981 would also be applicable to the termination decision itself if the employer, for racial reasons, fired a black employee for misconduct for which white employees were or would have been disciplined in a less harsh manner. Such discriminatory disciplinary practices would violate the last clause of section 1981, a provision not at issue in Patterson, which requires that blacks "shall be subject to like punishment . . . and to no other" as whites. The equal punishment clause, on the other hand, would have no application to an employer who, with no pretense of disciplinary motive, selected employees for discharge on the basis of race.

[20] McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 275 (1976)(grievance); Delaware State College v. Ricks, 449 U.S. 250, 252 (1980)(appeal of termination decision); St. Francis College v. Al-Khazraji, 481 U.S. 604, 606 (1987)(appeal of termination decision); Goodman v. Lukens Steel Co., 482 U.S. 656, 664 (1987)(grievance).

The complaint in this case, filed almost five years before Patterson, understandably does not address specifically all of the additional subsidiary facts that may be relevant, or even critical, after Patterson. The complaint does allege that respondent, prior to dismissing petitioner for an alleged violation of company rules, had chosen not to discharge whites "who have committed more serious violations of the company's rules" than had petitioner. JA 8, par. 15. This claim clearly falls within the equal punishment clause of section 1981. The complaint does not indicate, on the other hand, what petitioner may have said to company officials after the initial notice to petitioner that he had been dismissed; affidavits submitted by respondent indicate that there were at least two subsequent meetings between those officials and petitioner before petitioner finally left the

plant.[21] Under the Federal Rules of Civil Procedure, petitioner was not required in his 1984 complaint "to set forth specific facts to support [his] allegations of discrimination," or to anticipate any additional requirements that might follow from this Court's 1989 decision in Patterson. Conley v. Gibson, 355 U.S. 41, 47-48 (1957).

(2) Retaliation. Respondent urges this Court to hold that no form of retaliation is ever prohibited by section 1981, arguing that all retaliation constitutes post-formation conduct. (P. Br. 17-19). The application of section 1981 to retaliation claims raises a large number of different legal issues, because of the wide variety of circumstances in which some form of race related

[21] Petitioner testified that while he was operating his machine Larry Miller told him of the termination. Tr. 143. Subsequently petitioner apparently met both with Al Duquenne, the production superintendent, and then with the Employee Relations Department. Affidavit of Al Duquenne, p. 3.

retaliation might occur. We do not undertake to speculate as to what all those circumstances might be, or to analyze how section 1981, and Patterson, might be applied in each. It is sufficient at this juncture to observe that there are at least several types of retaliatory actions that would undoubtedly still be actionable in the wake of Patterson.

Section 1981 would certainly prevent an employer from punishing employees because they insisted, in compliance with section 1981 itself, on hiring in a racially non-discriminatory manner, or because they objected to discriminatory hiring practices forbidden by section 1981. The section 1981 prohibition against discrimination in the making of contracts includes within its penumbra protection for those who comply with or protest

violations of that statutory command.[22] Second, as this Court noted in Patterson, the equal enforcement clause of section 1981 "covers wholly private efforts to impede access to the courts or obstruct · onjudicial methods of adjudicating disputes about the force of binding obligations." 105 L.Ed. 2d at 151 (emphasis added). Thus the enforcement clause would be violated if a racially motivated employer had a practice of retaliating against any black employees who sought to enforce their contract rights. Third, section 1981 would by its own terms apply to racially motivated efforts of a third party to interfere with efforts by a black to make a contract with a new employer, including efforts triggered by a racially based retaliatory motive. Fourth, racially motivated retaliation against an individual for seeking to

[22] Malhotra v. Cotter & Co., 50 FEP Cases 1474 (7th Cir. 1989) (Cudahy, J., concurring); English v. General Development Corp., 50 FEP Cas. 825, 826-28 (N.D. Ill. 1989).

file suit or give evidence would violate the right guaranteed by section 1981 "to sue, be parties, [or] give evidence."

Racially motivated retaliation against individuals who file Title VII charges violates, at the least, the statutory rights to sue and give evidence. As this Court stressed in Patterson, the filing of a Title VII charge is a prerequisite to the commencement of a Title VII lawsuit; section 1981's protection of the right to bring that or any other lawsuit necessarily encompasses protection of the steps that are legally required in order to maintain such litigation. In addition, Title VII requires that any individual filing a Title VII charge submit an allegation "in writing under oath." 42 U.S.C. § 2000e-5(b). The submission of such a sworn statement, setting forth the

details and basis of a claimant's charge, is protected by the section 1981 guarantee of an equal right to give evidence.

Respondent urges that section 1981 does not apply to any form of retaliation related to Title VII because Title VII itself did not exist when section 1981 was first enacted. (R. Br. 17-18). But the language of section 1981 is not limited to the right to sue under, or give evidence in connection with, statutes that had been adopted prior to 1866. The Congress which enacted section 1981 certainly intended to give blacks a right to sue under or give evidence relating to whatever new statutory or common law rights might be established in the future.

Respondent argues that petitioner failed to allege that the asserted retaliation was racially motivated. The supplemental complaint asserted that respondent

"retaliated against [petitioner] for filing a charge of discrimination." (JA 40, par. 29). Respondent contends that section 1981 would not be violated if an employer had a practice of retaliating equally against all individuals, white as well as black, who filed Title VII charges. That is not a correct interpretation of section 1981, but it would be an extraordinarily strained reading of the complaint in this case to construe it as asserting the existence of such a uniform, race-neutral retaliation policy on the part of respondent. The more plausible reading of the complaint, which charges respondent with favoring whites over blacks in a variety of different ways, is as alleging respondent retaliated because a black had filed a Title VII charge. If respondent had any doubt about the precise nature of this claim, liberal pretrial procedures were available to resolve the matter. Conley v. Gibson, 355 U.S. at 47-48.

(3) Retroactivity. Respondent urges the Court to adopt a per se rule that Patterson will be applied retroactively to all cases pending on June 15, 1989. Whether a civil case should be applied retroactively depends on a number of different circumstances spelled out in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-08 (1971).

The criteria set forth in Chevron often do not yield a single rule applicable to all cases and every conceivable circumstance. Central to the Chevron analysis is whether a new decision "overrul[ed] clear past precedent on which litigants may have relied." 404 U.S. at 106. Thus the appropriateness of retroactivity in a given case will often depend, at least in part, on the precise nature of the claim, on the date when the case was filed, and on the state of the law on that date in the relevant circuit or district court. Compare Goodman v.

Lukens Steel Co., 482 U.S. 656, 663 (1987) (retroactive application of Wilson v. Garcia, 471 U.S. 261 (1985), appropriate because there was not a clear Third Circuit rule to the contrary when the suit was filed in 1973) with St. Francis College v. Al-Khazraji, 481 U.S. 604, 608-09 (1985)(retroactive application of Wilson not appropriate because there was clear Third Circuit precedent to the contrary when the suit was filed in 1980).

The appropriateness of retroactive application of Patterson will thus depend, at least in part, on the specific circumstances of each case. Defendants have sought to rely on Patterson in a variety of different types of cases, including claims alleging racially discriminatory promotions, demotions, transfers, discharges, and retaliation. The reigning law in each circuit with regard to each of these types of claims, and the date on which any controlling circuit decision was issued, vary widely, as

do the dates on which each of the still pending section 1981 actions was filed. The differences among the lower courts regarding retroactive application of Patterson reflects differences in the relevant circuit court law at the times when those various suits were initiated. See, e.g., Thomas v. Beech Aircraft Corp., 1989 U.S. Dist. LEXIS 11284 (D. Kan. 1989)(denying retroactive application of Patterson because application of section 1981 to discharge cases was "universally recognized" by Tenth Circuit precedent prior to Patterson).

Resolution of the retroactivity issue in this particular case must begin, at least, with an assessment of the relevant Fourth Circuit precedent as of December 6, 1984, the date on which the instant action was commenced. By that point in time the Fourth Circuit had held that racially motivated discharges were

actionable under section 1981;[23] the status of precedent in that circuit regarding section 1981 retaliation claims is less clear. In any event, St. Francis College and Goodman indicate that the evaluation of the state of circuit court precedents on a given date should be made in the first instance by the particular court of appeals whose decisions are at issue.

A linchpin of the decision in Patterson was the majority's concern that section 1981 not be construed in a manner that would circumvent or deter resort to the administrative machinery established by Title VII. But the petitioner in this case did file a timely Title VII charge, and thereafter included a Title VII claim in his complaint. On the other hand, the complaint alleges, the respondent attempted to prevent utilization of the Title VII administrative process by retaliating against petitioner

[23] Pope v. City of Hickory, N.C., 679 F. 2d 20 (4th Cir. 1982).

for having invoked it. In the courts below respondent repeatedly argued that a plaintiff could not pursue a section 1981 claim unless he or she withdrew any related Title VII claim; respondent actually prevailed on this theory in the district court. In this Court, respondent takes the opposite approach, arguing that petitioner's section 1981 claims should be dismissed lest a plaintiff like petitioner voluntarily ignore the "well-crafted procedures" of Title VII. (R. Br. 15.) But in the courts below, and, allegedly, when the administrative charge was filed, it was respondent who attempted, unsuccessfully, to force petitioner to forsake those very procedures. For respondent to now prevail by invoking the sanctity of the Title VII procedures which it previously sought to

eviscerate would be a perversion of the rationale of Patterson.

Respectfully submitted,

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